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Nos. 92-733 & 92-734

In The

Supreme Court of the United States

October Term, 1992

CURTIS CHEEVES, *et al.*,

Petitioners,

vs.

SOUTHERN CLAYS, INC. and THE RHODE ISLAND CHARITIES TRUST,

Respondents.

On Petition for Writs of Certiorari, Mandamus and Prohibition to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI, MANDAMUS AND PROHIBITION

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QUESTIONS PRESENTED

1. Given 28 U.S.C. § 292(b), which states that "the chief judge of a circuit *may*, in the public interest, designate and assign *temporarily* any district judge of the circuit to hold a district court in any district within the circuit" (emphasis added), did the chief judge of the Eleventh Circuit abuse his discretion by assigning a district judge in this case *temporarily* to decide two matters relating to petitioners' repeated attempts to recuse the presiding judge?

2. Must a presiding judge be deemed to have engaged in retaliation against petitioners' counsel, sufficient to warrant that judge's recusal, merely because the judge suggested that counsel's conduct may have violated Fed. R. Civ. P. 11 in that counsel filed five successive motions for recusal, all related to the very same set of underlying facts that had previously been determined both by the district court and by the Eleventh Circuit to be insufficient to warrant recusal?

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STATEMENT OF THE CASE

The petitions for certiorari, mandamus and prohibition now before this Court are the latest installment in what has regrettably become petitioners' apparently endless effort to disqualify Judge Wilbur D. Owens, Jr. of the Middle District of Georgia, who has been presiding over these consolidated cases since they were filed in 1986.[1] Petitioners' quest for recusal has been denied at every turn, including in rulings on seven motions filed with the district court, on one appeal and two mandamus petitions to the Eleventh Circuit and on one unsuccessful prior petition for certiorari to this Court in a related case. *See Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570, 1584 (M.D. Ga. 1992) (describes seven motions); *Cheeves v. Southern Clays Inc.*, No. 86-43-1-MAC (WDO) (M.D. Ga. Oct. 30, 1992) (describes seven motions) (included in Appendix to this Brief at 1a); *In re Theodore Gibson, et al.*, No. 90-8561 (11th Cir. June 25, 1990) (first denial of writs of mandamus and prohibition); *In re Robert Watkins, Theodore Gibson, Curtis Cheeves, et al.*, No. 92-8554 (11th Cir. June 26, 1992) (second denial of writs of mandamus and prohibition) (included in Petitioners' Brief in No. 92-734 at A-1); *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990) (table case) (rejecting recusal argument) (included in Appendix to this Brief at 13a), *reh'g and suggestion for reh'g en banc denied*, 931 F.2d 901 (11th Cir.) (table case), *cert. denied*, __ U.S. __, 112 S. Ct. 333 (1991).

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1. The merits of the underlying consolidated cases, which are not at issue here, concern petitioners' challenge to the validity of two purchases of land by respondent Southern Clays, Inc., which was at all material times owned by respondent The Rhode Island Charities Trust. By way of providing further information to comply with this Court's Rules 24.1(b) and 29.1, respondents note that Southern Clays, Inc. has no subsidiaries, and also note that petitioners have listed as petitioners a number of persons who are not plaintiffs in the cases below.

Petitioners' seven motions seeking to have Judge Owens recused have been filed in two cases. *See* Appx., 1a. Five of the motions were filed in these consolidated civil cases ("the *Cheeves* civil cases") now before this Court. Appx., 2a. Two others were filed in a criminal proceeding ("the *Watkins* criminal case"), then pending before Judge Owens involving Robert Lee Watkins, a non-attorney representative of the petitioners who had been charged with suborning perjury. Appx., 2a, 3a. All seven of the recusal motions have related in varying degrees to what petitioners contend was an improper conference between Judge Owens and another judge in his district, Judge Duross Fitzpatrick. Appx., 6a.

In the conference between the two judges, Judge Fitzpatrick informed Judge Owens, as the Chief Judge of the Middle District, of his belief that Mr. Watkins had suborned perjury in a case pending before him. *See United States v. Watkins,* No. 90-8317, slip op. at 2-3 (11th Cir. Dec. 7, 1990) (unpublished), included in Appendix to this Brief at 13a. Judge Fitzpatrick sought Judge Owens' directions on how to handle the cases pending before Judge Fitzpatrick involving Mr. Watkins under the circumstances. Appx., 14a. The event of this conference has formed the centerpiece of petitioners' motions to recuse, and it is the principal basis for their contention that Judge Owens either is biased or should be assumed to be biased against Mr. Watkins, and also against petitioners and their counsel by association. *See* Appx., 6a.

Judge Owens rejected petitioners' first three motions for recusal in the *Cheeves* civil cases, ruling, among other things, that a conference concerning the administration of the court between two judges is not an *extra-judicial* event, which is the kind of event necessary to support recusal. *See* 797 F. Supp. at 1577. Petitioners responded to these rulings by seeking mandamus relief in the Eleventh Circuit, which was denied. *In re Theodore Gibson,* No. 90-8561 (11th Cir. June 25, 1990).

Contemporaneously with these events in the *Cheeves* civil cases, parallel events were occurring in the *Watkins* criminal case. Mr. Watkins and his counsel (who also serves as petitioners' counsel in the *Cheeves* civil cases) filed two motions raising the same recusal issue, and Judge Owens made similar rulings rejecting them. *See* 797 F. Supp. at 1575-77. Mr. Watkins appealed those rulings to the Eleventh Circuit. The Eleventh Circuit expressly rejected the recusal challenge holding affirmatively that the Judge Owens-Judge Fitzpatrick conference was not grounds for recusal as a matter of law. Appx., 14a-15a.

The Eleventh Circuit explained the circumstances surrounding Judge Fitzpatrick's alleged communication with Judge Owens as follows:

> [Watkins] . . . asserts that [Judge Owens] was biased as a result of conferring with [Judge Fitzpatrick]. Taking all reasonable inferences favorable to [Watkins], the context of the alleged conference is as follows: [Judge Fitzpatrick], while presiding in a civil case, conferred with his chief judge [Judge Owens] concerning the appropriate procedure when he suspected that [Watkins] had aided and abetted perjury. The procedure which was in fact followed (and therefore may have been discussed with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case.

Appx., 14a. The Eleventh Circuit concluded that these facts, even when viewed in the light most favorable to Mr. Watkins, did not constitute a legally sufficient argument for disqualification:

> [A]ny information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge, in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of [Judge Owens].

Appx., 14a-15a. After the Eleventh Circuit rejected his appeal, Mr. Watkins petitioned this Court for certiorari to review the decision of the Eleventh Circuit on the recusal issue, and this Court denied certiorari. *Watkins v. United States*, __ U.S. __, 112 S. Ct. 333 (1991).

While the criminal matter was being pursued through the appellate process, counsel for petitioners and Mr. Watkins filed judicial misconduct charges against Judge Owens relating to the Judge Owens-Judge Fitzpatrick conference with the Eleventh Circuit Judicial Council under 28 U.S.C. § 372(c). Petition for Certiorari in No. 92-734, p. 9.[2] In the *Cheeves* civil cases, petitioners subsequently filed a fourth motion to recuse Judge Owens on the grounds that Judge Owens must have become biased by that point against *counsel* because counsel had made so many allegations of wrongdoing against Judge Owens. *See* 797 F. Supp. at 1578. That motion was denied.

Petitioners then sought to file a fifth recusal motion in the *Cheeves* civil cases, but, before doing so, petitioners sought to take the depositions of Judge Owens and the other two judges in the Middle District of Georgia to support their then-proposed fifth recusal motion again relating to the Judge Owens-Judge Fitzpatrick conference. Rather than have Judge Owens decide

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2. The charges of misconduct against Judge Owens were rejected by the Eleventh Circuit Judicial Council. Petition for Certiorari in No. 92-734, p. 12.

whether he and the other judges in the Middle District of Georgia should be deposed, the Chief Judge of the Eleventh Circuit (the Honorable Judge Gerald Bard Tjoflat) issued an order pursuant to 28 U.S.C. § 292(b) and appointed Judge W. Terrell Hodges of the Middle District of Florida to sit temporarily in the Middle District of Georgia to decide whether the judges of the Middle District of Georgia could be deposed.[3] 797 F. Supp. at 1572. After receiving this temporary assignment, Judge Hodges held a hearing and later issued an order on June 17, 1992 ruling that the judges could not be deposed under the circumstances. 797 F. Supp. at 1570-84.

While the deposition issue was pending, petitioners filed the referenced fifth motion for recusal. Judge Owens subsequently rejected that fifth motion and stated that:

> The court finds that this fifth motion to recuse has risen to the level of harassment. Nix [petitioners' counsel] has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

(Order of June 5, 1992, included in Appendix for Petition for Certiorari in No. 92-734 at A-9). Judge Owens was relying on Rule 11 of the Federal Rules of Civil Procedure which prohibits parties and their counsel from filing any pleading which is baseless or which is for an improper purpose, such as to harass.[4]

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3. 28 U.S.C. § 292(b) provides:

> The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

4. Fed. R. Civ. P. 11 provides as follows:

(Cont'd)

Following Judge Owens' order suggesting a Rule 11 violation, Judge Tjoflat of the Eleventh Circuit, again acting under the authority of 28 U.S.C. § 292(b), appointed Judge Hodges a second time to decide the Rule 11 issue. In the interim, petitioners

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(Cont'd)

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

sought and were denied mandamus relief on the issue of Judge Owens' rejection of the fifth motion for recusal. Petition for Certiorari in No. 92-734, A-1. Following that denial of mandamus by the Eleventh Circuit, petitioners have petitioned for certiorari, mandamus and prohibition in this Court.

Shortly after petitioners filed the instant petitions for certiorari, mandamus and prohibition here, Judge Hodges completed his second temporary appointment by ruling on the Rule 11 issue. Appx., 1a-12a. He ruled that petitioners' counsel had violated Rule 11. Appx., 10a. Judge Hodges fined petitioners' counsel, finding that "no reasonable lawyer . . . would have filed the last two motions [for recusal] after the Court of Appeals decisions." Appx., 10a.

In deciding the Rule 11 issue, Judge Hodges specifically rejected the contention that petitioners' various recusal motions (including those filed in *United States v. Watkins*) were each based on different grounds. Judge Hodges stated:

> All of the motions . . . and the orders denying them, shared two common features which [petitioners' counsel] simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick, concerning an act of subornation of perjury by Robert L. Watkins, the [petitioners'] agent, so that Chief Judge Owens' impartiality toward Watkins and the [petitioners] might reasonably be questioned.

Appx., 6a (footnote omitted). Judge Hodges also found all of the

motions were premised on an argument that clearly lacked support under the disqualification statutes:

> Secondly, the orders denying the motions — including the unpublished opinion of the Court of Appeals in the criminal case [*United States v. Watkins*] — consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

Appx., 6a. Judge Hodges imposed sanctions in part because petitioners counsel urged and re-urged a claim that "was repeatedly and correctly rejected as legally insufficient." Appx., 9a.

Petitioners now petition this Court for writs of certiorari, mandamus and prohibition. Petitioners argue that Chief Judge Tjoflat did not have the authority to make two temporary appointments of Judge Hodges, and they argue that Judge Tjoflat should have instead appointed Judge Hodges permanently to handle the entire case. Petitioners also argue that Judge Owens' Rule 11 statements represent retaliation against petitioners' counsel and reflect a bias against counsel, allegedly mandating Judge Owens' recusal. For the reasons stated herein, respondents submit that these arguments do not constitute grounds for granting writs of certiorari, mandamus or prohibition in this case.

THE WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION SHOULD BE DENIED

Respondents submit that the instant petitions for certiorari, mandamus and prohibition plainly do not meet this Court's criteria for the granting of such writs. *See* Sup. Ct. R. 10, 20.

1. The Two Issues Presented In The Petitions Were Not Presented To The Court of Appeals.

Petitioners ask this Court to grant certiorari, mandamus and prohibition on two issues: (1) whether a judge can be temporarily assigned, rather than permanently assigned, to a case under 28 U.S.C. § 292(b); and (2) whether Judge Owens' suggestion of a Rule 11 violation constitutes a reprisal against petitioners' counsel mandating recusal. *See* Petition for Writ of Certiorari in No. 92-734, pp. i-ii. Petitioners imply that the Eleventh Circuit wrongfully failed to grant them relief on these issues, and petitioners seek a "reversal" in this Court. *Id.* at 1, 24, 30. Yet, neither of these two issues was argued to the Eleventh Circuit. *See* 11th Cir. Petition for Mandamus, included as an Appendix to this Brief at 16a-29a.

The Eleventh Circuit was presented with the general question of whether the mere length of the 28 U.S.C. § 372 Judicial Council proceedings involving Judge Owens constituted a sufficient appearance of impropriety so as to require recusal of Judge Owens in these cases. The two issues now raised here were not addressed below, and that itself constitutes a sufficient reason to deny the writs requested. It is not the practice of this Court to act as a court of first resort to decide issues that were not previously presented to the Court of Appeals. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (*per curiam*).

2. The Petitions Do Not Meet The Criteria For Certiorari, Mandamus or Prohibition.

Petitioners do not claim to have satisfied any of the criteria for certiorari or mandamus set out in Sup. Ct. R. 10 and 20, with the exception that petitioners purport to describe exceptional circumstances and an abuse of discretion allegedly necessitating relief which cannot be obtained elsewhere. Petition for Certiorari in No. 92-734, pp. 23, 25, 26. Respondents respectfully submit that it is not an exceptional circumstance (1) for the chief judge of the Eleventh Circuit to make a *temporary* appointment of a district judge under a statute that expressly allows *temporary* appointments (28 U.S.C. § 292(b)); and (2) for Judge Owens to conclude that petitioners' counsel might have violated Rule 11 by filing a fifth motion for recusal after a previous four motions were rejected, all related to the very same underlying circumstances.

In addition, the alleged exceptional circumstances here all arise out of the same recusal fact pattern, and none of the three courts that have considered those facts to date — including this Court — have found that those facts warrant any relief whatsoever, much less the discretionary and extraordinary relief represented by writs of certiorari, mandamus and prohibition. Moreover, there can be no showing that relief cannot be obtained elsewhere since the precise two issues here, while arising out of the same basic facts, have not been presented to the Eleventh Circuit. Finally, the issue of recusal is premature, since plaintiffs seek interlocutory relief before any judgment on the merits has been entered against them.

3. There Is No Basis For Reviewing Judge Tjoflat's Temporary Appointment of Judge Hodges Under 28 U.S.C. § 292(b).

Petitioners' lead issue is their complaint that Judge Tjoflat appointed Judge Hodges to these cases temporarily to decide two recusal-related issues, instead of appointing him permanently to

decide all issues, including the merits. Judge Tjoflat's decision was made under 28 U.S.C. § 292(b), which provides:

> The chief judge of a circuit *may*, in the public interest, designate and assign *temporarily* any district judge of the circuit to hold a district court in any district within the circuit.

28 U.S.C. § 292(b) (emphasis added). The statute thus expressly contemplates temporary appointments and gives the chief judge discretion as to when to exercise this power. Judge Tjoflat's decision falls within his discretion under the statute, and no abuse of that discretion has been shown. Petitioners have cited no case calling into question the exercise of discretion undertaken here.

Moreover, it was entirely proper for Judge Tjoflat to decide that the two issues assigned to Judge Hodges were appropriate for decision by him, while the rest of the case could remain with Judge Owens. The two issues assigned to Judge Hodges were (1) whether Judge Owens and two other judges should be deposed; and (2) whether petitioners' counsel had harassed Judge Owens in violation of Rule 11 by filing a fifth consecutive motion for recusal on the same subject. Both of these issues involved a question of whether Judge Owens was entitled to relief — relief from a deposition and relief from alleged harassment. It was perfectly reasonable for Judge Tjoflat to decide that a judge other than Judge Owens should decide whether Judge Owens was entitled to relief. Judge Hodges was appointed for that purpose. It is equally reasonable for Judge Owens to retain jurisdiction over the remainder of the case, including over the merits, particularly where the remaining matters do not involve any issue of relief in favor of Judge Owens.

4. It Does Not Constitute Reprisal Mandating Recusal For A Judge To Suggest That Counsel Violated Fed. R. Civ. P. 11 By Filing A Fifth Motion For Recusal Based on The Same Circumstances Rejected As Grounds For Recusal In Four Prior Motions.

Petitioners argue that Judge Owens should be recused because, even if he is not prejudiced against petitioners, he has become biased against petitioners' *counsel.* This bias against counsel is said to arise out of Judge Owens' alleged reaction to the charges of wrongdoing lodged against him by petitioners' counsel. The bias is said to be manifested by Judge Owens' suggestion in June 1992 that petitioners' fifth motion for recusal had "risen to the level of harassment", warranting sanctions under Fed. R. Civ. P. 11, unless petitioners' counsel could show that sanctions were not warranted. Petitioners' argument is severely flawed, and does not warrant a writ of certiorari, mandamus or prohibition.

First, the ruse of attempting to turn the *accusation* of disqualification into *grounds* for disqualification has been generally rejected by the courts. As noted in 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3542 (2d ed. 1984), "[a] party cannot force disqualification by attacking the judge and then claiming that these attacks must have caused the judge to be biased against him . . . ." *Id.* § 3542, pp. 577-78. In accordance with this principle, courts have not allowed disqualification to be based on the filing of a judicial complaint or other forms of attack. *See In re Winslow,* 107 B.R. 752, 753 (D. Colo. 1989) ("The filing of a complaint with the Judicial Council is not grounds for disqualification."); *United States v. Studley,* 783 F.2d 934, 940 (9th Cir. 1986) ("A judge is not disqualified by a litigant's suit or threatened suit against him . . . or by a litigant's intemperate and scurrilous attacks . . . ."). It is clear that the disqualification statutes are not to be abused in this fashion:

> This motion raises another issue: the potential abuse of the disqualification statute

> as a method of avoiding having cases heard by a particular judge. Absent a clear and reasonable indication that prejudice against a party urging recusal of a judge is likely to result, the moving party should not be able to "bootstrap" its recusal argument with a second claim that the judge now will be biased against it because it has raised the question of the judge's impartiality.

In re X-Cel, Inc., 61 B.R. 691, 695 (N.D. Ill. 1986), *appeal dismissed*, 823 F.2d 191 (7th Cir. 1987).

As the foregoing authorities make clear, the mere fact that petitioners and their counsel have attacked Judge Owens and filed a judicial complaint is not grounds for automatic disqualification. If it were otherwise, all litigants would have within their power the tool to easily avoid judges, who, for whatever reason, they wish to avoid. This would effectively enable "judge shopping." Contrary to petitioners' argument, courts cannot be disqualified on the basis of theoretical speculation that the court might not be impartial.

Second, petitioners cannot use as a grounds for recusal an allegation of reprisal based on the mere fact that Judge Owens believed that a Rule 11 violation had occurred. Fed. R. Civ. P. 11 provides in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, *the court*, upon motion or *upon its own initiative*, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses

> incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Emphasis added.) The rule contemplates that Rule 11 procedures can be invoked by the court on its own initiative. This suggests that such invocations are in fact normal within the framework of the Rule, not extraordinary grounds for recusal of the judge.[5]

Finally, the crowning evidence on this point is that Judge Owens' suggestion of a Rule 11 violation was found to be meritorious by an independent judge. Appx., 10a. This is further evidence that it was not per se retaliation, as petitioners suggest.

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5. Petitioners observe that respondents did not seek Rule 11 sanctions and they argue from that that Judge Owens' perceptions of a Rule 11 violation were unique and retaliatory. Brief for Petitioner in No. 92-734, p. 19. This is a specious and unjustified contention. Respondents have uniformly argued that all of petitioners' recusal motions were repetitive and baseless. Respondents refrained from seeking Rule 11 sanctions simply because the subject appeared to be more appropriately a matter left between petitioners' counsel and Judge Owens.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petitions for writs of certiorari, mandamus and prohibition should be denied, and respondents request that the costs of this proceeding be assessed against petitioners.

Dated: November 20, 1992

Respectfully submitted,

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APPENDIX A — OPINION AND ORDER OF JUDGE HODGES ASSESSING SANCTIONS AGAINST FRANKLIN R. NIX PURSUANT TO FED. R. CIV. P. 11 FILED OCTOBER 30, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CASE NOS. 86-43-1-MAC(WDO)
and
86-44-2-MAC(WDO)

CURTIS CHEEVES, et al.,

Plaintiffs,

-vs-

SOUTHERN CLAYS, INC., et al.,

Defendants.

OPINION AND ORDER

Attorney Franklin R. Nix is counsel of record for the Plaintiffs. During a period of two and a half years he has filed in these cases and in a related criminal case[1] no less than seven separate and successive motions seeking to have Chief Judge Wilbur D. Owens, Jr., disqualified as the presiding judge. All of those motions have been denied.

On another occasion, at a time when no such motion for disqualification was pending, Mr. Nix caused deposition notices and subpoenas *duces tecum* to be served on Chief Judge Owens, as well as the other judges of this district, seeking to orally depose

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1. *United States v. Watkins*, Case No. 89-46 MAC(WDO) Criminal.

them "with respect to factual matters relevant to Chief Judge Owens' disqualification." I was designated at that time pursuant to 28 U.S.C. § 292(b) by the Chief Judge of the Circuit for the purpose of deciding motions to quash those subpoenas; and, by opinion entered June 17, 1992, I ordered that the subpoenas should bc quashed and that dcpositions of the judges could not be taken. *Cheeves v. Southern Clays, Inc.*, ___ F.Supp.___(M.D. Ga. 1992) (1992 WL 165479). That opinion recited the factual circumstances surrounding each of the various motions tor recusal, and there is no need, therefore, to repeat that discussion here.

While those proceedings involving the depositions of the judges were pending before me, Mr. Nix filed his seventh and most recent motion for recusal of Chief Judge Owens.[2] By order entered June 5, 1992, Chief Judge Owens denied that motion and, in the concluding paragraph of the order, stated:

> The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

I was then designated for a second time by the Chief Judge ot the Circuit pursuant to 28 U.S.C. § 292(b) to "handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr., to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in

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2. The motion, filed April 9, 1992, was in fact the fifth such motion made in these civil cases. The other two motions, bringing the total to seven, were filed in the related criminal proceeding (see note 1, *supra*.) The motion of April 9, 1992 purported to be addressed to me but I declined to consider it on its merits because I was only designated to decide the deposition issue, not the underlying issue of disqualification. See *Cheeves v. Southern Clays. Inc., supra.*

[these cases]." Mr. Nix filed a timely written response to the order to show cause and I then scheduled and conducted a hearing in the matter on September 16, 1992.

Three issues are presented. The first, raised during oral argument at the hearing, is whether the court has subject matter jurisdiction under Rule 11 to impose any sanctions in the circumstances of this case. The second issue, assuming jurisdiction exists, is whether Rule 11 has been violated; and the third issue involves the appropriate sanction to be imposed in the event a violation of the rule is found. I have determined that subject matter jurisdiction does exist, i.e., that Rule 11 does apply; that the rule has been violated; and that an appropriate sanction in the form of a fine should be imposed.

Mr. Nix points out that the opposing parties have not sought Rule 11 sanctions in the form of attorney's fees or the like; that Chief Judge Owens invoked the rule of his own volition; and that the alleged violation is limited to harassment[3] which, presumably, refers to harassment of the court itself rather than opposing counsel or the opposing litigants since they have made no such claim. From this it is argued that any alleged harassment of the court would necessarily constitute a criminal contempt which can only be dealt with pursuant to Rule 42(b), F. R. Cr. P., or perhaps 18 U.S.C. § 401, and that Rule 11 simply does not apply. Hence, on the present record, Nix argues, the Court is without subject matter

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3. Rule 11, F. R. Civ. P., states in pertinent part:

> The signature of an attorney . . . constitutes a certificate by the signer that the . . . motion, or other paper . . . is not interposed for any improper purpose such as to *harass* or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis supplied).

jurisdiction to impose any sanction against him.

While it is true that there does not appear to be any reported case just like this one in which a court has invoked Rule 11 *sua sponte* to punish counsel for acts of harassment, and while it may also be true that the same behavior would constitute a criminal contempt subject to prosecution. under Criminal Rule 42(b) or 18 U.S.C. § 401, it does not necessarily follow that Rule 11 is thereby rendered inapplicable. There is ample authority for the proposition that Rule 11 can be invoked by the district court on its own motion; the rule, in fact, explicitlv provides that the court may act "upon its own initiative." There is also binding precedent in this Circuit concerning Rule 11 violations that a monetary sanction as a financial penalty, not measured by costs or attorneys' fees of opposing parties, is not only an available option under the rule, it is often the preferred sanction. In *Donaldson v. Clark*, 819 F.2d 1551 1557 (11th Cir. 1987) *en banc*, the Court held:

> Imposing a financial penalty often will be the most effective and fair means of enforcing Rule 11 and deterring baseless suits. When imposed upon a lawyer, a financial penalty forces the lawyer rather than the client to bear the costs of violations of the rule . . . . We hold that monetary sanctions serve the purposes of Rule 11 and may be imposed as sanctions for Rule 11 violations in appropriate cases so long as they are imposed with due process.

The Court also held in *Donaldson* that the contempt rule, Rule 42(b), F. R. Cr. P., need not be followed every time a court considers imposing a monetary sanction, and that a violation of Rule 11 is "fundamentally different from an infraction of criminal

contempt and therefore warrants different sanction proceedings." Id. at 1558. *See also Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209-1210 (11th Cir. 1985) (imposition of fine in disciplinary proceedings distinguished from criminal contempt).

I therefore conclude that Rule 11 can properly be invoked in the circumstances presented by this case, and the fact that the same circumstances might also be made the basis of contempt or disciplinary proceedings does not alter that result.

II

Concerning the central issue of whether counsel's behavior has amounted to harassment in violation of Rule 11, Mr. Nix first argues that the last motion in these civil cases was not even addressed to Chief Judge Owens for decision but was, instead, addressed to me. This alone demonstrates, he says, that harassment of Chief Judge Owens was not intended and could not have been accomplished. This approach, of course, totally ignores the historical background consisting of all of the preceding motions and seeks inappropriately to confine attention to the last motion alone for purposes of the Rule 11 analysis. Clearly, however, in determining whether harassment has occurred it is necessary to examine the totality ot the relevant conduct and the pattern of behavior presented. The word "harassment," almost by definition, will rarely apply to a single act; it usually contemplates a series of acts or taunts. In deciding this issue, therefore, the court will take into account the cumulative effect of, and the circumstances surrounding, all of Mr. Nix's motions to disqualify Chief Judge Owens including those filed in the related criminal proceeding.[4]

4. Of course, Rule 11 has no effect in the criminal case and cannot be applied with respect to any motions filed in that case. It is appropriate, however, to consider the filing of those motions as a part of the overall pattern of conduct from which the Rule 11 issue arises.

Appendix A

With regard to the frequency and repetitive nature of the motions, Mr. Nix argues that each one differed in some important respect from its predecessors so that each motion was, in the language of Rule 11, "well grounded in fact and . . . warranted by existing law." He points out, for example, that the second motion in the civil cases (the third overall motion) was predicated upon "new evidence,"[5] and that the next motion in the civil cases (the fifth overall motion) was based upon both 28 U.S.C. § 144 and § 455(a), accompanied by affidavits, whereas the earlier motions were submitted on the sole authority of § 455(a) without supporting affidavits.

All of the motions, however, and the orders denying them, shared two common features which Mr. Nix simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick. concerning an act of subornation of perjury by Robert L. Watkins, the plaintiffs' agent, so that Chief Judge Owens' impartiality toward Watkins and the plaintiffs might reasonably be questioned.[6] Secondly, the orders denying the motions — including the unpublished opinion of the Court of Appeals in the criminal ease — consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

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5. This "new evidence" is discussed in *Cheeves v. Southern Clays, Inc., supra* ___ F.Supp. at ___.

6. The subornation of perjury by Watkins was the subject of the separate criminal proceeding referred to in note 1, *supra*.

Appendix A

There are two separate statutes governing judicial disqualification. The older statute is 28 U.S.C. § 144 which provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further. . .

The newer statute, enacted in 1974, is 28 U.S.C. § 455 (a) and (b) which provides:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party. . .

The interrelationship of Sections 144 and 455 was first considered in this Circuit[7] in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir.

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7. The law of the Fifth Circuit as it existed prior to October 1, 1981, is the law of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) *en banc*.

1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The Court held:

> Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. *The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context.* This means that we give §§144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned. (Emphasis supplied).

See also, Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Meester*, 762 F.2d 867 (11th Cir. 1985), *cert. denied*, 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985); *Jaffree v. Wallace*, 837 F.2d 1461 (11th Cir. 1988).

Mr. Nix argues that Section 455(a), requiring disqualification

whenever a judge's "impartiality might reasonably be questioned," creates a broader basis for recusal than Sections 144 or 455(b)(1) which are restricted to cases of "personal bias," and that under Section 455(a) a disqualification may be required in some cases even when the alleged bias stems from a judicial as distinguished from a personal source. Ordinarily, however, as all of the governing Eleventh Circuit decisions make clear, claims of bias or prejudice under either statute must relate to personal rather than judicial bias; and this remains true under subsection (a) as well as subsection (b) of Section 455. When it is asserted that a judge's "impartiality might reasonably be questioned," it must be shown that the cause stems from extrajudicial conduct; it is only the exceptional case in which bias from a judicial source may require disqualification:

> An exception to the general rule that the bias must stem from an extra-judicial source exists where 'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.' (Citation omitted). *United States v. Meester*, 762 F.2d 867. 885 (11th Cir 1985).

In this case none of the motions for disqualification ever claimed a "pervasive" bias and prejudice shown by judicial conduct. Rather, as previously stated, the claim was that Chief Judge Owens' impartiality might reasonably be questioned because of so-called *ex parte* discussions, and one communication by letter, between Chief Judge Owens and Judge Fitzpatrick in a judicial context; and that claim was repeatedly and correctly rejected as legally insufficient.

Moreover, it is important to note that the repetitive motions for disqualification were not just rejected by Chief Judge Owens

alone. The latter two motions in these civil cases — one filed September 26, 1991 and one filed April 9, 1992 — were both submitted *after* the Court of Appeals had *twice* reviewed the denials of earlier motions, once by rejection of a petition for mandamus and prohibition, *In re Theodore Gibson*, No. 90-8561 (11th Cir., June 25, 1990), *reh'g and suggestion of reh'g en banc denied* (Sept. 18, 1990), and once again on the direct appeal in the criminal case. *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), *cert. denied* __ U.S. ___, 112 S.Ct. 333 (1991). *See also,Cheeves v. Southern Clays, Inc., supra,* ____ F. Supp. at ____, n. 10.

In determining the propriety of counsel's conduct under Rule 11, a preliminary question arises as to whether the rule requires a finding of an actual subjective intent to harass, or whether an objective test should be applied, i.e., determining what a reasonable person would have done, or refrained from doing, under the same circumstances. The answer is clear. Under the rule as amended in 1983, the objective standard applies. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) *en banc.*

After reviewing the totality of the circumstances, particularly the filing of seven successive repetitive motions; an apparent failure on the part of counsel to either acknowledge or accept the legal principle consistently applied by the Court in denying those motions, two of such rulings being made by the Court of Appeals itself; and after applying an objective standard to those circumstances (rather than a subjective or bad faith standard), I have concluded that Rule 11 was violated in this case. No reasonable person — no reasonable lawyer — would have filed the last two motions after the Court of Appeals decisions. Or, stated another way, in the language of Rule 11, from any objective point of view those motions could only have been "interposed for [an] improper purpose, such as to harass."

Appendix A

III

Having decided that Rule 11 applies. and that the rule has been violated it remains for the court to determine an appropriate sanction. Since no other party has sought an award of fees or costs (and there is no evidence before me to establish the measure or amount of any such award), the imposition of a fine is the appropriate sanction. *Donaldson v. Clark, supra.* In deciding upon the amount of the fine the court has first attempted to survey the Rule 11 sanctions previously imposed in this district and has discovered, interestingly, that *Donaldson v. Clark* happened to arise here and is the only reported decision involving a Rule 11 sanction in the Middle District of Georgia. In that case a fine of $500 was imposed in addition to fees and costs. In general, it has been held that fines should be established in the least amount necessary to deter future misconduct, and the offender's ability to pay is ordinarily one of the factors to be taken into account in making that judgment. See *White v. General Motors Corporation Inc.*, 908 F.2d 675, 684-685 (10th Cir. 1990) and authorities there cited. In this instance, although notice was given and a hearing was conducted, no evidence was sought or presented concerning Mr. Nix's individual financial status.

I have determined, therefore, that the publication of this opinion together with the assessment of a symbolic fine in the amount of $500.00 and a reference of the matter to the State Bar of Georgia[8] should be sufficient to meet all of the objectives of Rule 11.

Accordingly, attorney Franklin R. Nix is ordered to pay a fine in the amount of $500.00 to the Clerk of this Court. Such fine shall

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8. The Middle District of Georgia does not presently have a rule of court governing the discipline of members of its bar.

be paid within twenty (20) days, failing which the Clerk shall enter judgment against him in that amount in favor of the United States. The Clerk is further directed to promptly bring this opinion and order to the attention of the State Bar of Georgia for its consideration as to whether additional disciplinary proceedings may be warranted.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 27th day of October, 1992.

s/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

APPENDIX B — OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN *UNITED STATES V. WATKINS*, NO. 90-8317 (11TH CIR. DEC. 7, 1990)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8317

D.C. Docket No. CR-89-46-MAC(WDO)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LEE WATKINS,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(December 7, 1990)

Before KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

Robert Lee Watkins appeals his conviction of aiding and abetting a witness to testify falsely in violation of 18 U.S.C.

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

§§ 1623 and 2. Appellant claims on appeal that the testimony at issue, although admittedly perjured, was not material. This claim is frivolous.

Appellant also argues that the district judge erred in declining to recuse himself and in declining to refer the recusal decision to another judge pursuant to 28 U.S.C. § 144. After a careful review of the record, we conclude that the district judge did not abuse his discretion.

The letter dated July 11, 1989 conveyed certain information relating to the previous judge's decision to recuse himself. The district judge in this case received that information in his judicial capacity, *i.e.*, as the chief judge of the district with responsibility for reassigning the case. Thus, the district judge acquired that knowledge in his judicial capacity and not in an extra-judicial capacity. Moreover, there is nothing in the letter which indicates bias on the part of the district judge; the letter indicates bias only on the part of the previous judge on account of which he recused himself.

Appellant also asserts that the district judge in this case was biased as a result of conferring with the previous judge. Taking all reasonable inferences favorable to appellant, the context of the alleged conference is as follows: The previous judge, while presiding in a civil case, conferred with his chief judge concerning the appropriate procedure when he suspected that appellant had aided and abetted perjury. The procedure which was in fact followed (and therefore may have been discussed with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case. Thus, any information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge,

in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of the judge.

The other assertions of bias on the part of the district judge are wholly without merit and warrant no discussion.

AFFIRMED.

APPENDIX C — EXCERPTS OF JOINT PETITION FOR WRITS OF MANDAMUS AND PROHIBITION STYLED *IN RE ROBERT WATKINS, THEODORE GIBSON, CURTIS CHEEVES, ET AL.* FILED IN THE ELEVENTH CIRCUIT COURT OF APPEALS JUNE 12, 1992

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. [92-8554]

IN RE ROBERT WATKINS, THEODORE GIBSON, CURTIS CHEEVES, et al.,

Petitioners.

Petition from the United States District Court
for the Middle District of Georgia
Macon Division

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1651 and FRAP 21(a) this Petition seeks writs of mandamus and prohibition disqualifying The Honorable Wilbur D. Owens, Jr., The Honorable Duross Fitzpatrick, and The Honorable Robert Elliott from any further participation in the 28 U.S.C. § 2255 federal habeas proceeding now pending before Judge Owens in *U.S. v. Watkins* and from any further participation in two consolidated civil fraud "kaolin" cases now pending before Judge Owens and styled *Cheeves v. Gibson. et al. v. Southern Clays, Inc., et al.*

A. Misconduct Complaint Under 28 U.S.C. § 372(c).

All of the facts and circumstances relied upon herein were the

subject of a Judicial Misconduct Complaint ("the Complaint") against Judges Owens and Fitzpatrick filed with the Eleventh Circuit Judicial Council pursuant to 28 U.S.C. 372(c) and styled "*In the Matter of a Complaint Filed bv Franklin R. Nix*," Miscellaneous Docket No 90-2132 (the "Complaint"). Franklin R Nix is presently defense counsel in *U.S. v. Watkins* and lead plaintiffs' counsel in *Cheeves & Gibson. All of tho facts and circumstances incorporated by reference herein and under which Petitioners seek the disqualification of Judges Owen, Fitzpatrick and Elliott are identical to the known facts and circumstances presented to the Eleventh Circuit Judicial Council.* The Complaint was dismissed by order of the Eleventh Circuit Judicial Counsel on June 8, 1992

B. Watkins' § 2255 Federal Habeas Petition

The judicial conduct addressed in Watkins' § 2255 proceeding and this Petition spans the 6-year period from January of 1986 to the present date The conduct of Judges Owens, Fitzpatrick, and Elliott, acting individually or in concert, occurred in *U.S. v Watkins* and in four separate civil "kaolin" cases (*Tarbutton, McLendon, Cheeves* and *Gibson*). *U.S. v. Watkins* is apparently a product of Judges Owens' and Fitzpatrick's admitted *ex parte* "oral communications" respecting the investigation, indictment and conviction of Robert Watkins for supposedly "inducing, aiding, and abetting" the false testimony of a civil deposition witness in *Tarbutton.*

The same facts and circumstances investigated under the Complaint are also set forth in a 234-page Brief in Support of Watkins' § 2255 Petition and Motion to Recuse ("Brief in Support"), accompanied by 88 documentary exhibits which Petitioners incorporate by reference herein. (See index at Exhibit

Appendix C

A). Judge Owens' [sic] denied the motion to recuse in Watkins[']
§ 2255 proceeding on June 5, 1992. (Exhibit B).

C. Former Cheeves & Gibson Mandamus Petition.

A former mandamus petition, *In re Thedore Gibson, et al.*, Appeal No. 90-8561, was denied *per curiam* by Circuit Judges Fay, Kravitch, and Clark on June 25, 1990. A petition for rehearing and suggestion of rehearing *en banc* was denied *per curiam* on September 18, 1990. The prior *Cheeves & Gibson* petition, while presenting many of the same facts and circumstances relied upon herein, *did not* present facts and circumstances subsequently discovered. It also *did not* address subsequent developments in Petitioners' proceedings post-dating the denial of the original *Cheeves & Gibson* mandamus petition on June 13, 1990 and the *per curiam* affirmance of Watkins' conviction on December 7, 1990 by Circuit Judges Anderson, Kravitch and Senior District Judge Lynne. The former *Cheeves & Gibson* mandamus also predated the Special Committee's 18-month investigation of the Complaint.

Judge Owens denied the fifth recusal motion filed in *Cheeves & Gibson* on June 5, 1992. (Exhibit C). Describing counsel's filing of the fifth recusal motion in *Cheeves & Gibson* as "harassment," Judge Owens' order of June 5th orders counsel within "thirty days to show cause in writing why the court should not impose Rule 11 sanctions." (Ex. C at 3).

D. Inter-Relationship Between U.S. v. Watkins and Civil Kaolin Cases.

The inter-relationship between *U.S. v. Watkins* and four civil kaolin cases including *Cheeves & Gibson* lies in the fact that

Appendix C

Robert Watkins has acted as the attorney-in-fact pursuant to O.C.G.A. § 10-6-80 on behalf of the civil plaintiffs in *Cheeves & Gibson*. Watkins' same representative capacity in *Tarbutton* and *McLendon* was also the subject of the judicial conduct which occurred in *Tarbutton* and *McLendon*. *U.S. v. Watkins* and all four civil cases were the subject of the Special Committee's Complaint investigation.

E. Exhaustion of Remedies Through Prior Recusal Motions Filed Before Judge Owens.

While the following excerpt from the Special Committee's report states that Petitioners' counsel, in lieu of filing the Complaint, "could file" a § 144 affidavit or "could seek" disqualification under § 455(a), the fact is that *before* filing the Complaint counsel had *already filed* two recusal motions in *U.S. v. Watkins* and three recusal motions in *Cheeves & Gibson* based on §§ 455 *and 144*, all of which were denied.

> Moreover, the Committee is mindful that the 18 (sic) U.S.C. § 372(c) proceeding was not designed to "encompass complaints relating . . . to any matter reviewable under any other provision of law on the record." S. Rep. No. 96-362, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4317. In fact section 372(c) explicitly authorizes dismissal of a complaint "directly relat[ing] to the merits of a decision or procedural ruling." 28 U.S.C. § 372(c)(3). "The complaint procedures of [section 372] provide administrative remedies *only* in the absence of appropriate judicial remedies." *In re Complaint of Judicial*

> *Misconduct*, 858 F.2d 331, 331-32 (6th Cir. 1988)(emphasis added); *see also Charge of Judicial Misconduct*, 691 F.2d at 925.
>
> In the matter at hand, Nix and the parties he represents did not have to resort to the complaint procedure of section 372 if they thought the district judge presiding over the case should be removed for bias or prejudice. Rather, they could file an affidavit, pursuant to 28 U.S.C. § 144 (1988), seeking removal of the judge on the ground that he had "a personal bias or prejudice either against [the filing party] or in favor of any adverse party." *See Matter of Judicial Complaint Under 28 U.S.C. § 372*, 795 F.2d 379, 381 (4th Cir. 1986). Alternatively, they could seek to have the judge disqualified, under 28 U.S.C. § 455(a) (1988), if the judge's "impartiality might reasonably be questioned." A party may seek disqualification of a judge under section 455 (a) during the course of the proceeding, or even after judgment has been entered in the case (as in *Tarbutton*), pursuant to Federal Rule of Civil Procedure 60(b). *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862-70, 486 S.Ct. 2194, 2204-07 (1988).

Special Committee Report at 67-68 (emphasis added).

Watkins' *third* recusal motion denied on June 5th (Exhibit B) is contained in the 234-page § 2255 Brief in Support filed herewith. The *fifth Cheeves & Gibson* recusal motion filed April 9th was

denied on June 5th. (Exhibit C). These motions were *both* predicated upon the same facts and circumstances presented in the Complaint and in the Watkins' § 2255 Brief in Support. The filing of this Petition is therefore the only recourse left open to Petitioners.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS.

The eighteen-month duration (9/14/90 to 6/8/92) of the Special Committee's work bears witness to the complexity of the Complaint's subject-matter. Accordingly, instead of attempting a summary of the alleged judicial misconduct, Petitioners incorporate by reference herein the Watkins § 2255 Brief in Support beginning at page 53 and the three-volume set of accompanying documentary exhibits. Because the undisputed course of the Complaint proceedings demonstrate that the judges' impartiality might reasonably be questioned under the facts and circumstances presented in the Complaint, the Court need not review the Brief in Support and exhibits in order to grant the writs sought herein.

III. STATEMENT OF ISSUES PRESENTED

1. Whether a disinterested, objective lay person, fully informed as to the § 372(c) Complaint proceedings concerning the judges "might reasonably question the impartiality" of the judges toward Petitioners and Petitioners' counsel who filed the Complaint?

2. Whether a disinterested, objective lay person fully informed as to the § 372(c) Complaint proceeding concerning the judges might reasonably find it to represent a situation which presents *at least* the "appearance of impropriety?"

3. Whether any doubts about the propriety of the judges presiding over Petitioners' proceedings must be resolved in favor of disqualification through issuance of the writs sought by Petitioners?

IV. STATEMENT OF RELIEF SOUGHT

Petitioners seek issuance of a Writ of Mandamus and Prohibition disqualifying the named judges from any further participation in the Watkins' § 2255 proceeding and the *Cheeves & Gibson* cases. Pending resolution of this Petition, Petitioners pray for a stay of Judge Owens' June 5th order (Exhibit C at 3) directing counsel within "thirty days to show cause in writing why the court should not impose Rule 11 sanctions" for the purported "harassment" of the court through counsel's filing of the fifth *Cheeves & Gibson* recusal motion.

V. STATEMENT OF WHY THE WRITS SHOULD ISSUE

A. Effect of § 372(c) Complaint Dismissal.

The Judicial Council's June 8th dismissal of the section 372(c) Complaint against Judges Owens and Fitzpatrick requires several preliminary observations. First, this Petition *does not* represent a collateral attack upon the Judicial Council's June 8th order of dismissal. Such order is subject to review exclusively by an appeal to the United States Judicial Conference pursuant to 28 U.S.C. § 372(c)(10). Rather, this Petition represents the actual exercise of the "appropriate judicial remedies" provided by 28 U.S.C. §§ 144 and 455, both of which figured prominently in the Special Committee's report recommending dismissal, the relevant portions thereof being quoted *supra* at pages 4 - 5. Indeed, Petitioners exhausted *five times* (twice in Watkins and three times

in *Cheeves & Gibson*) the disqualification remedies contemplated under both recusal statutes *before* counsel's filing of the § 372(c) Complaint.

Second, the Judicial Council's order of dismissal represents an *administrative* determination that the judges did not engage in "conduct prejudicial to the effective and expeditious administration of the business of the courts" and *is not* a *judicial* decision barring review herein, under principles of *res judicata* or collateral estoppel, of the entirely different factual issues presented by this Petition under 28 U.S.C. § 144 and 455. Unlike the Complaint just resolved by the Judicial Council, this Petition presents the distinctly different issues of whether a disinterested, objective lay person fully informed of all of the facts alleged in the § 372(c) Complaint (and in the Watkins' Brief in Support) "might reasonably question the impartiality" of the judges.

Finally, regarding the Special Committee's report or the Judicial Council's dismissal of the Complaint as dispositive of this Petition would effectively *nullify* the very alternative "appropriate judicial remedies" which the Special Committee said Petitioners "could file" or "could seek" — remedies which Petitioners in fact exhausted by five recusal motions denied *before* the Complaint's filing. Deeming the Judicial Council's order of dismissal to be dispositive of this Petition would effectively place Petitioners in the Catch 22 situation of *not having* the very alternative remedies which the Special Committee has cited to justify dismissal of the Complaint. (Special Committee Report at 67-68, quoted *supra* at pages 4 - 5[)].

Chief Judge Tjoflat, rather than dismissing the Complaint's objective facts as frivolous, found it necessary to appoint a Special Committee and devote eighteen months of time, unknown

investigative attorneys' fees, and countless hours of the precious judicial time of five Special Committee members to resolution of the Complaint. Without reviewing the accompanying Watkins Brief in Support at all, the Complaint proceedings alone and the actions of the Chief Judge and the Special Committee reflect *at a minimum* their belief that the Complaint's objective facts possibly presented at best the "appearance of impropriety" and at worst actual impropriety prejudicial to the integrity of the judiciary if the "worst implications" of the objective facts were realized[2].

In summary, the quantum of facts necessary to warrant the extraordinarily rare appointment of a Special Committee *substantially exceeds* the quantum of facts under which § 455(a)'s hypothetical, fully-informed "man-in-the-street" might reasonably question the impartiality of the judges. Concluding otherwise requires finding that the Special Committee wasted 18 months worth of time and resources investigating facts that would not even prompt a fully informed objective, disinterested lay person to question the impartiality of the judges. Accordingly, the length, scope, and expense of the Special Committee's investigation has itself become the single most indicative "objective fact" upon which a disinterested lay person, fully informed as to the Complaint proceeding "might reasonably question the impartiality" of the judges investigated notwithstanding the dismissal of the charges.

B. Lack of Adequate Alternative Relief.

Petitioners regret that it has become necessary to seek the extraordinary relief sought herein[3]. As the Second Circuit has

2. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524, n.12 (11th Cir. 1988)

3. Judge Fitzpatrick has already presumably disqualified himself pursuant to (Cont'd)

observed, however, "there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself' . . . A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re International Business Machines Corp.*, 618 F.2d 923, 926-27 (2d Cir. 1980). Likewise, in the seminal case of *Berger v. U.S.*, 255 U.S. 22 (1921), a case which predated the broad mandate of § 455(a), the Supreme Court eloquently explained the inadequacy of appellate remedies other than mandamus.

> To commit to the judge a decision upon the truth of the facts [in the Section 144 affidavit] gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

255 U.S. at 36 (emphasis added).

(Cont'd)

28 U.S.C. § 455(a)(1988) based upon his recusal from *McLendon* upon finding that his "impartiality might reasonably be questioned," and pursuant to 28 U.S.C. § 455(b)(1988) based on his admission that he holds a "personal bias" against Robert L. Watkins..

Appendix C

C. Abuse of Discretion.

When it comes to the question of disqualification, a federal judge's discretion is very narrowly circumscribed by the mandates of Sections 144 and 455 and The Code of Judicial Conduct for United States Judges. This Court has most recently stated the standard for recusal as follows:

> "Congress rewrote section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of section 455, *a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist.* Section 455 does away with the old 'duty to sit' doctrine and *requires judges to resolve any doubts they may have in favor of disqualification.*
>
> "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become

> known to the judge. *The standard for recusal under section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.*"

United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)(emphasis added)(citations omitted).

The "objective" test of § 455(a) is best understood in light of the problem which it was intended to address.

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5.

Liljeberg, 486 U.S. 864-65 (footnote omitted)(emphasis added).

The purpose of recusal is to protect the appearance as well as the reality of justice. "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance." *Hall v. Small Business Administration*, 695 F.2d 175, 176 (5th Cir. 1983). Thus the purpose of § 455 is "to promote public confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). The question, then, is not "whether there was actual bias," but whether there was " 'such a likelihood of bias or an appearance of bias that

the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' " *Spruell v. Jarvis*, 654 F.2d 1090, 1095 (5th Cir. 1981). Therefore, the test for determining disqualification is "the reasonable factual basis-reasonable man test" and not the "subjective 'in the opinion of the judge' test." *Davis v. Board of School Commissioners of Mobile Co.*, 517 F.2d 1044, 1052 (5th Cir. 1975). The question to be answered is "whether a reasonable person knowing all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986).

While the alleged bias must be personal as opposed to judicial in nature, *United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985), here the alleged bias is personal. "The objective appearance of bias arises out of a number of accusations made by defendant and his counsel concerning [the judge] and certain members of [his] staff." *United States v. Journet*, 620 F. Supp. 684 (W.D. Pa. 1985). *See also United States v. Meyerson*, 677 F. Supp. 1309 (S.D.N.Y. 1988) (Although prosecutor's allegations were untrue, judge voluntarily recused self because his resentment of prosecutor's tactics prevented him from maintaining impartiality and appearance of impartiality that are necessary to the proper administration of justice.)

Since a reasonable judge would find it necessary to disqualify himself or herself in the face of the allegations made by Mr. Nix in his Complaint and prior recusal motions and by Mr. Watkins in his § 2255 Petition and Brief in Support, the basis for disqualification here rises to constitutional dimensions. This is because the Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990).

Appendix C

In the words of the Eleventh Circuit, the question that must be answered is whether the material facts create a situation that " 'Presents a potential for actual impropriety *if the worst implications are realized.*' " *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 n. 12 (11th Cir. 1988) (emphasis added) (citation omitted), cert. denied, 109 S. Ct. 2066 (1989). After drawing the worst implications from the material facts presented, the Eleventh Circuit has held that it must "resolve *any* doubts . . . in favor of disqualification." *United States v. Kelly,* 888 F.2d 732, 744 (11th Cir. 1989) (emphasis added).

VI. CONCLUSION

In conclusion, for the reasons stated above, Petitioners request that the relief requested herein be granted.

Respectfully submitted,

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